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89- 1402

FILED

MAR 2 1990

JOSEPH F. SPANIOLO, JR.
CLERK

No.:

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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NORMAN HEIFNER, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

=====

PETITION FOR A WRIT OF CERTIORARI
STATE OF CALIFORNIA COURT OF APPEALS
THIRD APPELLATE DISTRICT

=====

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(415) 834-8000

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QUESTIONS PRESENTED

1. Whether jeopardy can attach to a series of federal narcotics violations plead as the basis of a federal Continuing Criminal Enterprise prosecution which is dismissed after jury trial so as to bar a subsequent state prosecution for the same violations when a state statute abolishes the state's right to claim dual sovereignty?

PARTIES TO THE PROCEEDINGS

Norman Heifner was the party in the proceeding.



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PETITION FOR WRIT OF CERTIORARI
STATE OF CALIFORNIA COURT OF APPEALS
THIRD APPELLATE DISTRICT

TO: THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA, THIRD DISTRICT

The petitioner, NORMAN HEIFNER,
respectfully prays that a writ of certiorari
issue to review the judgment of the California
State Court of Appeals entered on October 19,
1989.

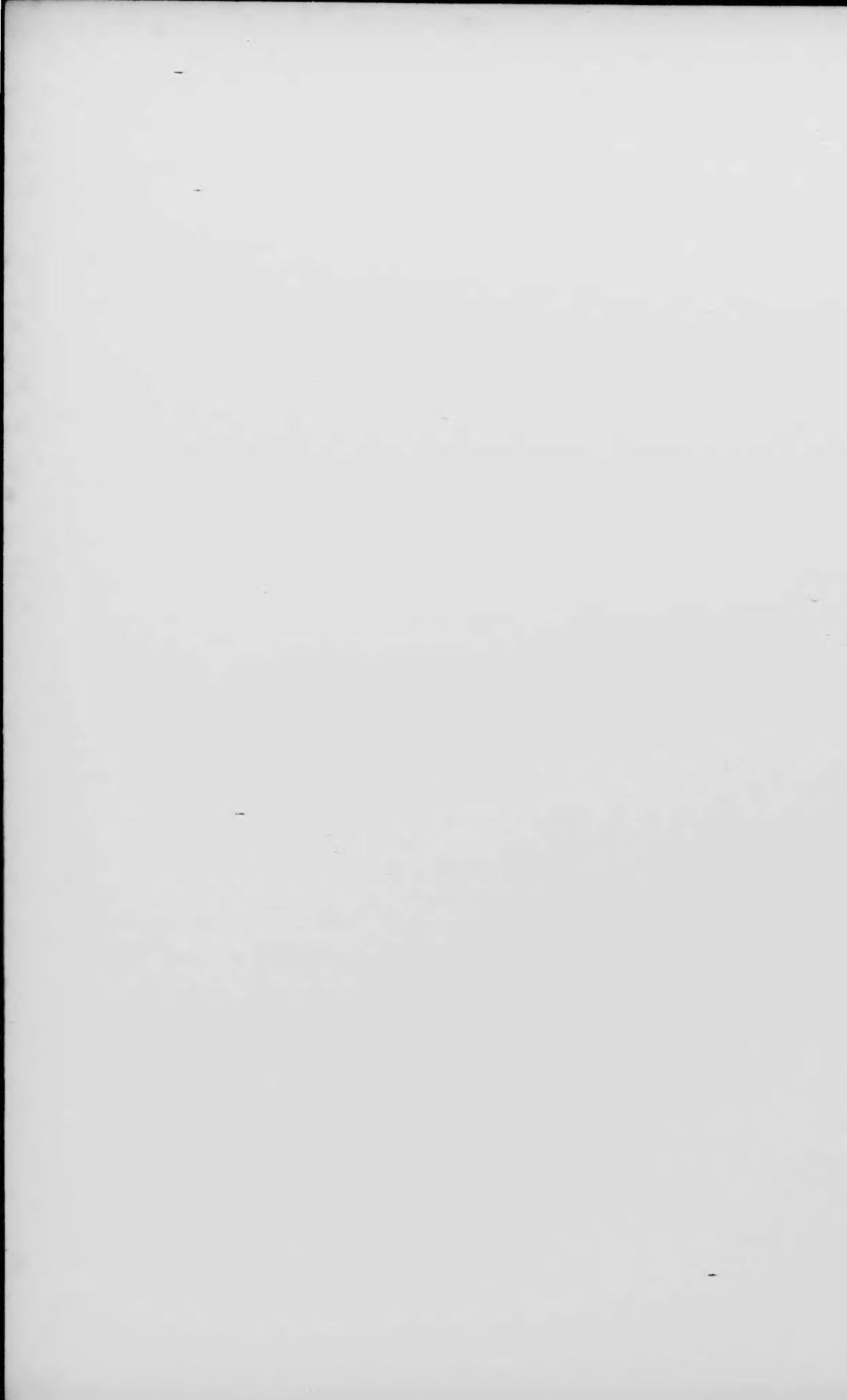


OPINION BELOW

On October 19, 1989, the California State Court of Appeals for the Third Appellate District entered its memorandum affirming the conviction of petitioner for conspiracy to manufacture, sale and possession of methamphetamine in violation of California State Health and Safety Code §11379, §11377 and Penal Code §182. A copy of this memorandum, which is not to be published, is attached Appendix A.

JURISDICTION

On October 19, 1989, the Court of Appeals entered judgment affirming the conviction of petitioner for conspiracy to manufacture, sale and possession of methamphetamine in violation of California State Health and Safety Code



§11379, §11377 and Penal Code §182. Petitioner filed a petition for review before the California State Supreme Court on November 28, 1989, a petition which was denied by the court without comment on January 4, 1990. A copy of the order denying review by the Supreme Court of California is attached hereto as Appendix B. Jurisdiction of this Court is invoked under Title 28 United States Code No. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment Five:

"No person will be subject for the same offense to be twice put in jeopardy for the same offense."



STATEMENT OF THE CASE

This case stems from a drug conspiracy charged with beginning in January 1982 in California. An information charging petitioner with conspiracy to manufacture, sale and possession of methamphetamine was filed in California State Court in November of 1986. Petitioner entered pleas of not guilty to the charges.

While the case was pending in California, petitioner was indicted in the United States District Court, Western District of Missouri charging a Continuing Criminal Enterprise alleging as a series of criminal violations needed to be proved exactly the same offenses as charged against him in California. The Federal case proceeded to jury trial in April



of 1987. At the completion of the government's case in Missouri, the court dismissed the action against petitioner.

Petitioner returned to California to face those state charges. Petitioner entered once in jeopardy pleas in California to the same allegations which were included in the Federal Charge. Petitioner also claimed his prosecution was barred by California statute which abolishes the principal of dual sovereignty so that a prosecution based upon the same acts or omissions is barred in California if prosecuted by some other government or state (California Penal Code §656).

Petitioner waived a jury trial and the case was submitted to the Court on a stipulated set



of facts. The stipulated facts were that the same evidence and witnesses that were presented against petitioner in the Federal case would be the only evidence presented in California. Furthermore, that the California charges were exactly the same as the charged series of criminal violations which constituted the Continuing Criminal Enterprise charged federally.

The California court found jeopardy had not attached nor was the prosecution barred by California statute. It found Petitioner guilty and sentenced him to two years in State prison.

REASONS FOR GRANTING THE WRIT

The principle behind Fifth Amendment will be severely eroded if this decision is left

to stand.

The California Court of Appeal confused and equated the series of federal narcotic law violations required to be proved to establish a continuing criminal enterprise with the pleading of overt acts.

In mistakenly believing that the series of violations were only overt acts, it decided that jeopardy could not attach in petitioner's case as criminal liability cannot attach to an overt act.

However, these series of violations are not overt acts. They are distinct federal narcotic law violations United States v. Valenzuela 596 F.2d 1361, 1367 (9th Cir. 1979).

These federal narcotic law violations



usually are substantive charges in the indictment although they need not be United States v. Michel 588 F.2d 896, 1000 (5th Cir. 1979).

They clearly are lesser included offenses. In Blockburger v. United States 284 U.S. 304 (1932) the principal was established that jeopardy attaches to lesser offenses of the greater offense if it is necessarily included within it.

Blockburger, supra, examined statutory elements as to whether the committing of one crime must necessarily require committing the other. See Brown v. Ohio, 432 U.S. 161, 168 (1977).

California has broadened the federal test as to whether an offense is necessarily

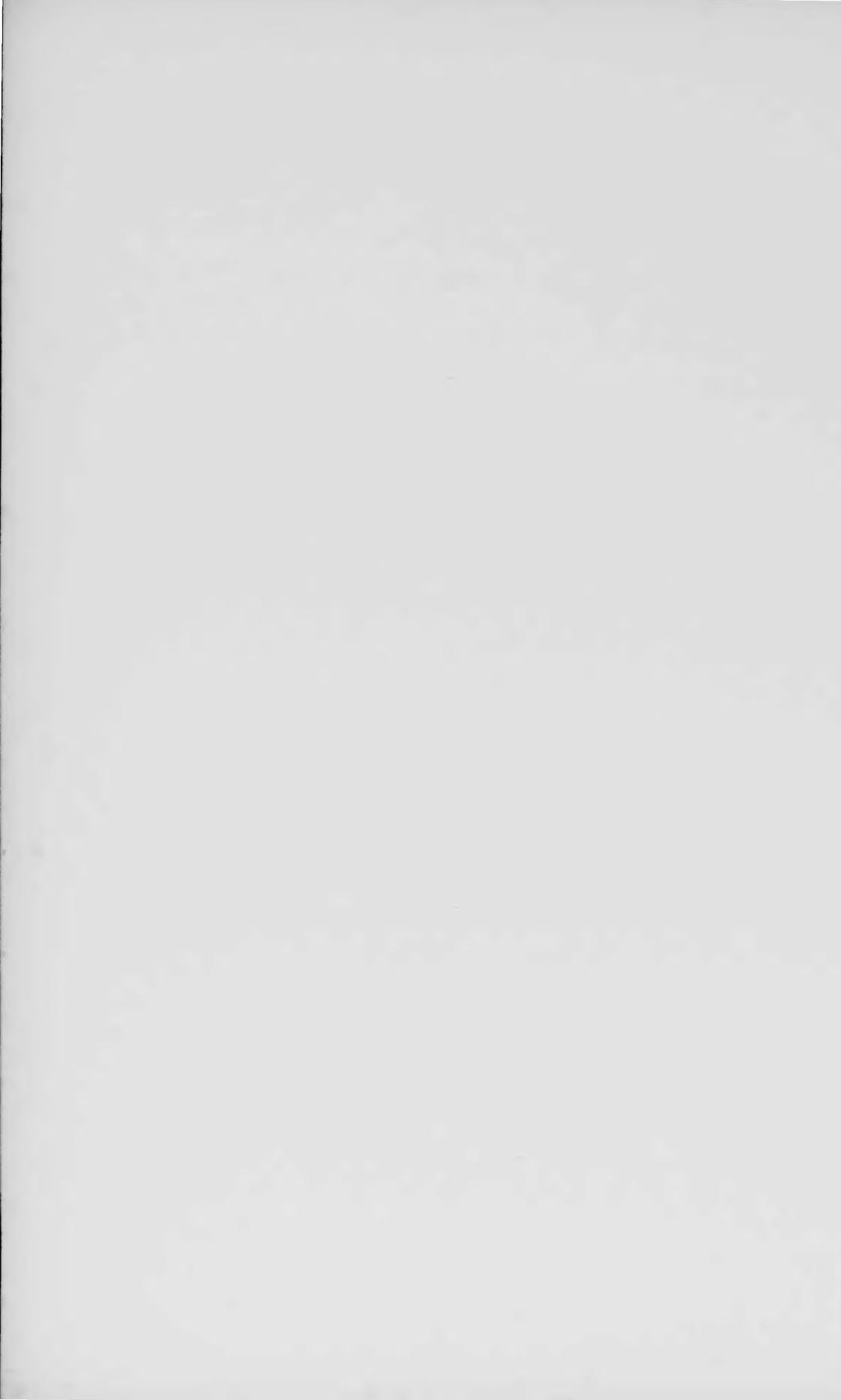


included by also examining the specific language of the accusatory pleading People v. Marshall, 48 Cal.2d 394 (1957).

In petitioner's matter, the California charges were exactly the same ones plead as the series of federal narcotic violations in the continuing criminal enterprise in the federal indictment.

CONCLUSION

To permit this decision to stand would cause the double jeopardy clause to be disregarded by simply labeling a violation of law as an overt act. Clearly the California court misunderstood the nature of a continuing criminal enterprise charge. For the foregoing reasons, petitioner respectfully submits that the petition for certiorari should be granted.



Dated: February 28, 1990

Respectfully submitted,

RICHARD E. HOVE
Attorney for Petitioner
NORMAN HEIFNER



PROOF OF SERVICE

I am a citizen of the United States, I am over the age of eighteen years and not a party to the within action; my business address is: 1401 Lakeside Drive, Suite 700, Oakland, California 94612.

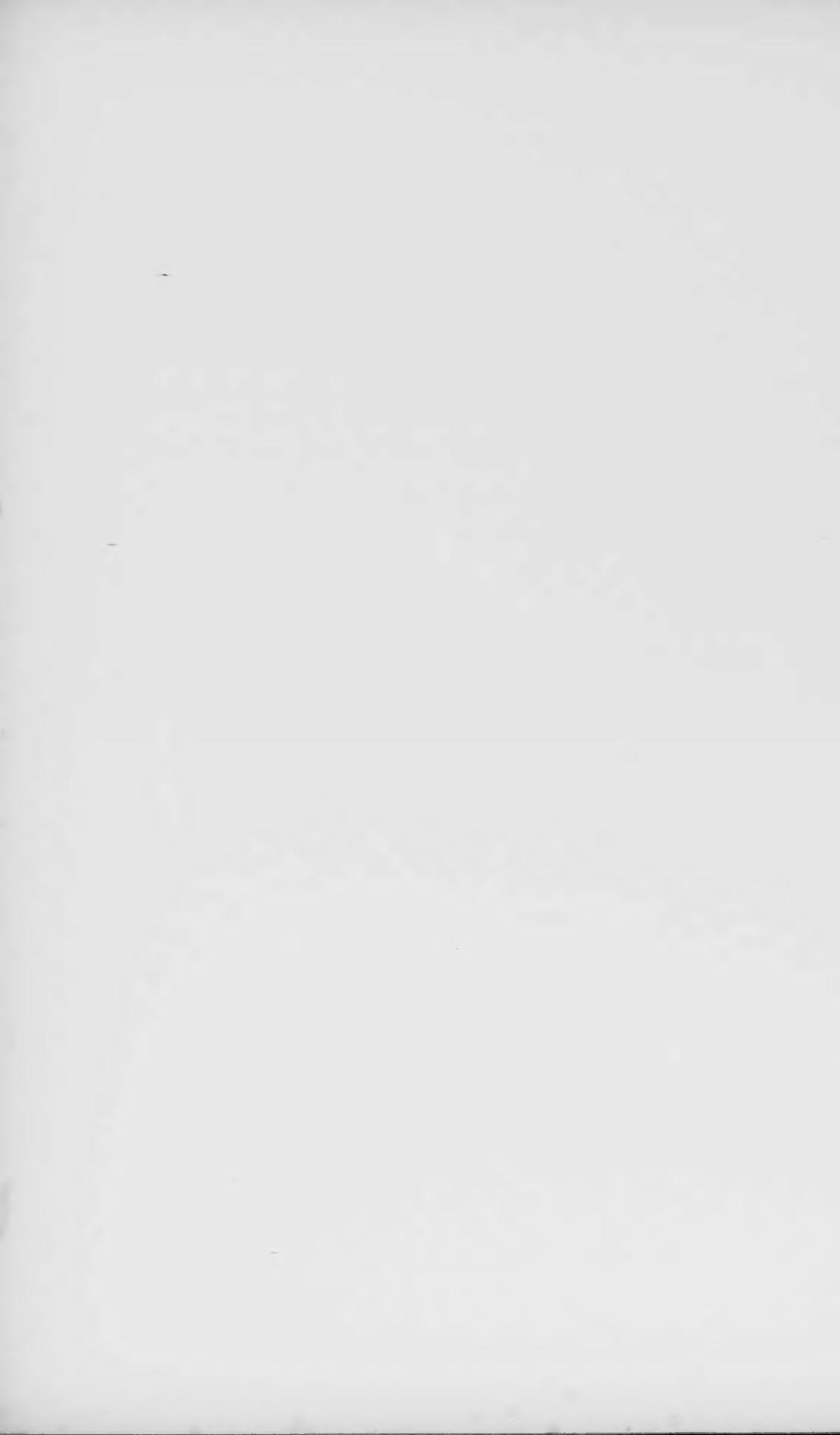
On February 28, 1990 I served the within:

PETITION FOR WRIT OF CERTIORARI

on the interested parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California, addressed as follows:

Clerk of the Superior Court
720 Ninth Street, Room 103
Sacramento, CA 94814

Office of the State Attorney General
P.O. Box 944255
Sacramento, CA 94244



Clerk of the Court
Court of Appeal
Third Appellate District
Library and Courts Building
914 Capitol Mall
Sacramento, CA 95814-4869

District Attorney's Office
Sacramento County
720 Ninth Street
Sacramento, CA 95814

Norman Heifner
4498 Stage 2
New River, Arizona 85029

I, NANCY E. CAHILL, declare under penalty
of perjury that the foregoing is true and
correct and was executed on February 28, 1990
at Oakland, California.

NANCY E. CAHILL

NOT TO BE PUBLISHED
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT
(Sacramento)

Filed October 19, 1989
Court of Appeal
Third District
By: ROBERT L. LISTON, Clerk

THE PEOPLE,

Plaintiff and Respondent, C004628

v. (Superior
NORMAN HEIFNER, Ct. No.
77191)

Defendant and Appellant,

Following the denial of his plea of once in jeopardy (Pen. Code, §1016, subd. 5), defendant was found guilty in a trial by court of conspiracy to manufacture, transport, and



sell methamphetamine (Pen. Code, §§182, subd. 1; Health & Saf. Code, §11379 -- count I), sale of methamphetamine (Health & Saf. Code, §11379 -- counts II through V), and possession of methamphetamine (Health & Saf. Code, §11377 -- count VI).

Sentenced to state prison for the lower term of two years for the conspiracy conviction with concurrent lower terms for the remaining counts, defendant appeals contending the trial court erred when it determined he had not previously been placed in jeopardy on the foregoing counts. We shall affirm.

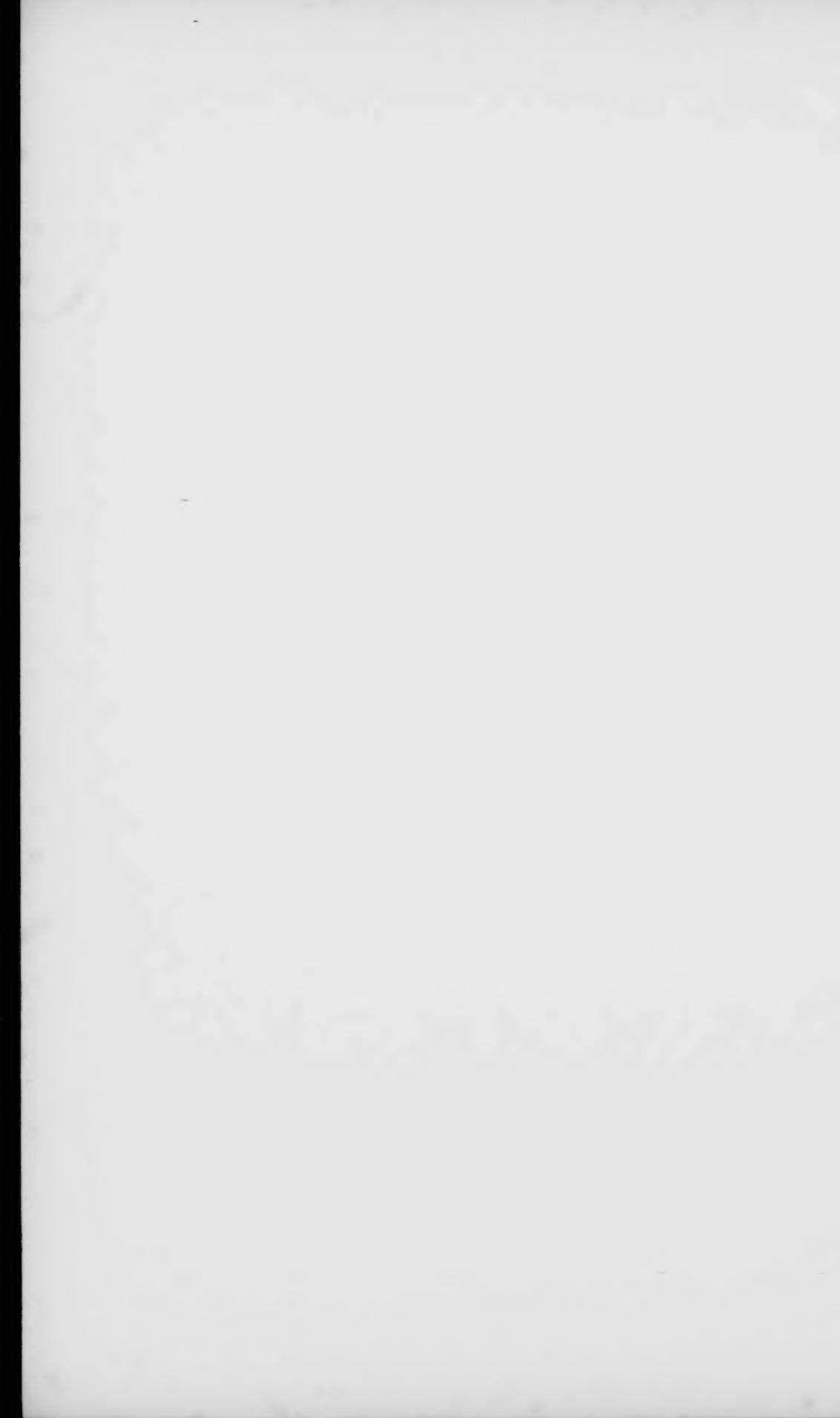
PROCEDURAL FACTS

By amended information, defendant was charged in Sacramento Superior Court on December 2, 1986, with the above offenses.

While the case was pending, defendant, along with others, was charged by superseding indictment in the United States District Court, Western District of Missouri, with engaging in a continuing criminal enterprise (21 U.S.C. §848 -- count II); conspiracy (21 U.S.C. §846 -- count III), manufacture of "P2P," a controlled substance, in Missouri (21 U.S.C. § 841, subd. (a)(1) -- count IV); and with manufacturing methamphetamine in Missouri (21 U.S.C. §841, subd. (a)(1) -- count V). The Sacramento case was continued to await resolution of the federal charges.

In April 1987, the case against the defendant and the codefendants went to a jury trial in Missouri. At the conclusion of the government's case, defendant moved for an

acquittal. The trial court foudn tha the government had proven three separate conspiracies rather than the requisite one continuing conspiracy as charged in the indictment and that the evidence failed to connect defendant with any conspiracy or other activity in Missouri. Having found the evidence did not conform to the charges and that there was no evidence of the crimes charged having occurred within its jurisdiction, the trial judge dismissed the charges against the defendant for lack of jurisdiction. In doing so, the trial court expressly noted that it was denying the motion for acquittal. Defendant then unsuccessfully sought to avoid prosecution in the Sacramento case by claiming prior jeopardy based upon the



dismissal of the federal case.

DISCUSSION

Defendant argues here, as he did in the lower court, that he was once in jeopardy on all offenses herein since the six counts of the information are included offenses of counts I and III of the federal indictment. This is so because the six counts of the information are specified among the nine overt acts alleged in the indictment.¹ This being the case, defendant argues, he faced conviction of the California offenses by the district court in Missouri, and was therefore, once in jeopardy on those charges. Defendant

¹ Counts I-IV of the information cocorrespond, respectively, to overt acts 1, 4, 5, 6, 2, and 7 of the indictment.

is wrong.

Initially, we note that insofar as the California charges are concerned, it is immaterial whether the federal case resulted in an acquittal or was a dismissal for lack of jurisdiction. This is because, as will be explained, defendant was not charged in the indictment, either directly or as included offenses, with any of the charges in the California information.

Under both California and federal law, it is well established that a conspiracy is a distinct offense from the actual commission of the offense forming the object of the conspiracy and that the guilty parties may also be held separately responsible for criminal acts committed in furtherance of the

conspiracy. (People v. Moore (1956) 143 Cal.App.2d 333, 340; United States v. Carter (1978) 576 F.2d 1061, 1064.) The alleging of overt acts, whether they are additional criminal offenses or non-criminal in nature, serves to give defendant notice of the conduct the People intend to rely upon to prove the conspiracy. (See Pen. Code, §184, requiring proof of at least one overt act within this state to effect the object of the conspiracy.) The alleging of overt acts which constitute crimes does not convert those overt acts into offenses included within the conspiracy. Indeed, as previously observed, a defendant may be convicted of both conspiracy and the crimes which are also alleged as overt acts in furtherance of the conspiracy.



Moreover, the error of defendant's position is amply illustrated by the present case. Here, defendant was charged in count I with conspiracy, with 21 overt acts in furtherance of that conspiracy alleged. Overt acts 1, 5, 14, 20 and 21 correspond, respectively, to counts II through V of the amended information. In light of the well-settled rule that a defendant cannot be convicted of both the greater and an included offense (People v. Kilborn (1970) 7 Cal.App.3d 998, 1003), one could conceivably contend that the convictions in counts II through VI must be reversed due to their being included offenses. However defendant does not make this argument, no doubt because he recognizes the equally well-settled rule regarding the propriety of

convictions for both the conspiracy and all criminal offenses committed in furtherance thereof even though they be alleged as overt acts.

The judgment is affirmed.

MARLER, J.

We concur:

PUGLIA, P.J.

SPARKS, J.

ORDER DENYING REVIEW
AFTER JUDGMENT OF THE COURT OF APPEAL
THIRD APPELLATE DISTRICT
No. C004628
IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

THE PEOPLE.

NORMAN HEIFNER,

Appellant,

Appellant's petition for review DENIED

LUCAS
Chief Justice